IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16732 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHAMMED SAEED @ SONU NURMOHAMMED SAIYED

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 16732 of 2003

MR AZIZ AN ALVI for Petitioner No. 1

MR LR PUJARI Ld. AGP for Respondent No.1-3

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 26/02/2004

ORAL JUDGEMENT

1. Mr.L.R.Pujari, learned AGP has placed on record the affidavit in reply on behalf of respondent no.1.

Same is kept on record.

2. Heard Mr.A.N.Alvi, learned advocate for the petitioner and Mr.L.R.Pujari, learned AGP for the respondents.

3. By this petition under Article 226 of the Constitution of India, the detenu - Mohammed Saeed @ Sonu Nurmohammed Saiyed, through his brother, has been challenging the order of detention dated 25.7.2003 (Annexure-A) passed by respondent no.1 under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act,1985 (hereinafter referred to as "the PASA Act") and quashing and setting of the said order.

4. The grounds of detention, copy whereof is at Annexure-B, suggest that the detenu is alleged to have been bringing liquor and beer from other States and has been indulging in the sale of the liquor with the assistance of his associates, and the said activity of the detenu and his associates is injurious to the public health. One case under Section 66(B), 65(A) and 116 of the Bombay Prohibition Act has been registered against the detenu. It is further alleged that the detenu is having a criminal tendency and always possessing deadly weapons with him, and that the detenu is a 'bootlegger' within the meaning of Section 2(b) of the PASA Act.

Two incidents dated 10.6.2003 and 12.7.2003 have also been referred to in the grounds of detention and the witnesses are stated to have given their statements, requesting that their identity be not disclosed for the reason of apprehension to their person and property and thereby, privilege under Section 9(2) of the PASA Act has been invoked.

5. Challenging the detention order (Annexure-A), it has been submitted by Mr.Alvi, learned advocate for the detenu that the impugned detention order is liable to be quashed on the ground that there is no breach of the public order. That there is no verification of the veracity of the genuineness with the statements of the witnesses and also the veracity of the incident. It is contended that there is no contemporaneous material in order to show the subjective satisfaction reached by the detaining authority.

6. It is submitted by Mr.Pujari, learned AGP that the activities indulged into by the detenu are injurious to the public health and thereby, it affects the public order. It is also contended that the witnesses in their

verification before the detaining authority have stated about veracity of the incident and that fear expressed by the witnesses is found to be genuine.

7. It may be seen that except the statements of the witnesses, whose statements have been verified by the detaining authority, there is no material in the form of statements of persons around the place of incident nor there is any contemporaneous material to show that the incident as alleged in reality took place in other words, the genuineness of the veracity of the incident which would also suggest that except the statements of the witnesses there is no contemporaneous material to show that the statements given by the witnesses are genuine and for that matter, the genuineness of the statements given by the witnesses also including the genuineness of the fear expressed by the witnesses. As far as the verification of the statements of the witnesses are concerned, all what is suggested is that what has been stated by the witnesses before the police is also stated to be true before the detaining authority.

8. In the case of Chandrakant N. Patel Vs. State of Gujarat & Others, 1994 (1) GLR 761, the Full Bench of this High Court observed that, ".... If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made known on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informent must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity, of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against the reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power

of detention. ..... In a case where a person is detained by way of preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognised as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefore, can properly be regarded as a mater of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. .... But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars and materials, then it cannot be said that the same was not done in public interest, and that the public interest likely to be subversed by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

9. In the case of Ranubhai Bhikhabhai Bharwad (Vekaria) Vs. State of Gujarat & Others, 2000 (3) GLR 2996 while considering the invoking of Section 9(2) of the PASA Act, the learned Single Judge in Para.8 has observed that, "merely because the witnesses were summoned and it is recorded that he had made such statement, that does not mean verification of the statements. What is to be verified is the veracity of the allegations levelled in such cases and with regard to a particular incident, it has to be verified. It is only after following such a process that the detaining authority can come to a subjective satisfaction about the correctness of the incident and to hold that all the witnesses were genuine and that the privilege under Section 9(2) was required to be taken and that it was not in public interest to disclose the names of witnesses who were not coming in open to depose against the petitioner out of fear. That identical situation had come up before this Court in the case of Kalidas C. Kahar Vs. State of Gujarat & Others, reported in 1993 (2) GLR 1659 dealing with Section 9(2) of the Act, the Division Bench in Para.9 has observed that, "at the time of exercising the privilege under Section 9(2) of PASA balance is required

to be struck between the public interest on one hand and the right of the detenu to make a representation under Article 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9(2) carved out on the basis of Article 22 (5) of the Constitution which provides that nothing in Subsection (1) shall require the authority making such order to disclose facts which it considers to be against the public order to disclose. The Division Bench has held that it is the duty of the detaining authority to strike a balance as stated above, that in public interest the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Section (2) PASA. The Division Bench found in the facts and circumstances of the case before it that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Section 9(2), as the proposal was made on 16.10.1992 and the order of detention was passed on the following day, i.e. 17.10.1992 nor is there any material to show as to how he examined the necessity of exercising the power under Section 9(2). Under the circumstances, the Division Bench held that it was a wrong exercise of power under Section 9(2) which has affected the detenu's right of making an effective representation under Article 22(5) of the Constitution of India, and therefore, the continued detention of the detenu is bad and illegal and impugned detention order was bad and illegal."

11. Thus, it will be seen that there is no contemporaneous material considered by the detaining authority for exercising the power under Section 9(2) of the PASA Act. All what appears from the verification by the detaining authority is that it had summoned the witnesses and the witnesses admitted the correctness of

the statements given by them, and also expressing their apprehension from the petitioner. What is further required to be verified is the veracity of the allegations levelled in such cases with regard to a particular incident which is to be verified. This process has not been followed in the instant case.

13. Under the circumstances, in my opinion, the requirement of Section 9(2) of the PASA Act cannot be said to have been complied with in the instant case and therefore, the detention order stands vitiated for want of proper exercise of power under Section 9(2) of the PASA Act and the resultant infringement of the constitutional right of the detenu of making effective representation.

14. In the result, the petition is granted and accordingly allowed. The impugned order of detention dated 25.7.2003 (Annexure-A) passed by respondent no.1 against the detenu -Mohammed Saeed @ Sonu Nurmohammed Saiyed is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.

(N.G.Nandi,J.)

(vipul)